

SEP 28 2007

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE LUIS GODINEZ; MARGARITA
A. GODINEZ,

Petitioners,

v.

PETER D. KEISLER,** Acting Attorney
General,

Respondent.

Nos. 06-71526
06-73774

Agency Nos. A98-130-825
A98-130-826

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted September 24, 2007***

Before: CANBY, TASHIMA, and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Peter D. Keisler is substituted for his predecessor, Alberto R. Gonzales, as Acting Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

In these consolidated petitions, Jorge Luis Godinez and Margarita A. Godinez, natives and citizens of Mexico, seek review of the Board of Immigration Appeals' ("BIA") order affirming the Immigration Judge's ("IJ") decision denying their applications for cancellation of removal, and the BIA's order denying their motion to reopen proceedings due to ineffective assistance of counsel. To the extent we have jurisdiction, it is conferred by 8 U.S.C. § 1252. We review for abuse of discretion the denial of a motion to reopen. *See Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857 (9th Cir. 2004) (per curiam). We dismiss the petition for review in No. 06-71526, and grant the petition for review in No. 06-73774.

We lack jurisdiction to review the discretionary determination that an applicant has failed to show exceptional and extremely unusual hardship to a qualifying relative. *See Romero-Torres v. Ashcroft*, 327 F.3d 887, 892 (9th Cir. 2003). We do not consider the petitioners' contentions regarding continuous physical presence because the hardship determination is dispositive. *See* 8 U.S.C. § 1229b(b)(1) (to be eligible for cancellation of removal the applicant must establish continuous physical presence, good moral character and hardship).

The BIA abused its discretion in denying the motion to reopen, because petitioners included evidence of their substantial compliance with the requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). First, petitioners provided a detailed affidavit, a payment receipt, and an attorney-client

fee agreement to substantiate their representation by prior counsel. Second, they submitted a copy of a complaint filed with the California state bar association. Third, they submitted a copy of certified mail receipts indicating that their counsel received a copy of the state bar complaint. *See Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir.2000) (discussing *Lozada* requirements); *compare Reyes v. Ashcroft*, 358 F.3d 592, 598 (9th Cir. 2004) (undated letter to prior counsel insufficient to meet notice and opportunity to respond requirements).

The BIA also abused its discretion by applying the wrong standard to determine whether the performance of prior counsel resulted in prejudice. The BIA required petitioners to demonstrate eligibility for cancellation of removal, when they need only demonstrate that the deficient performance by counsel may have affected the outcome of proceedings. *See Maravilla Maravilla*, 381 F.3d at 858-59 (BIA abused its discretion when it determined that counsel's performance did not result in prejudice by directly adjudging whether the petitioners would win or lose their claim).

Accordingly, we remand for the BIA to determine, under the correct standard, whether petitioners were prejudiced by prior counsel's conduct.

PETITION FOR REVIEW in 06-71526 DISMISSED.

PETITION FOR REVIEW in 06-73774 GRANTED; REMANDED.

RAWLINSON, Circuit Judge, dissents.